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Supreme Court, U.S.
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No. 95-552

In The

Supreme Court of the United States

October Term, 1995

HARFORD COUNTY, MARYLAND,

Petitioner,

vs.

CHESAPEAKE B & M, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

QUESTIONS PRESENTED[1]

1. Must a county ordinance provide for prompt judicial review in order to satisfy the free speech requirements of the First Amendment when the ordinance confers only ministerial discretion upon the licensor and is designed to protect the health, safety and welfare of its citizens by minimizing the undesirable secondary effects generally associated with an adult bookstore?

2. If the county ordinance must expressly provide for prompt judicial

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[1]Chesapeake B & M, Inc. has no parent, subsidiary or affiliated companies or corporations.

review, is that requirement satisfied if the ordinance affords a prompt exit from the administrative licensing system and an avenue of immediate appeal of that decision to the judiciary, or must the ordinance also provide for prompt completion of the judicial process in order to satisfy the procedural safeguards required under the First Amendment?

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STATEMENT OF THE CASE

The District Court found that the county ordinance unconstitutional because it lacked specific time limitations for the administrative process and that the

administrative process could be delayed indefinitely. (Apx. 12a & n6, 46a-49a). The District Court held that the County had no obligation to set time limits on judicial review. (Apx. 51a). Respondent appealed. The County did not cross-appeal. Relying on 11126 Baltimore Boulevard v. Prince George's County, 58 F.3d 988 (4th Cir. 1995), cert. pending (No. 95-550), the Fourth Circuit held that County did not provide for prompt judicial review that is necessary to guard against the abridgement of protected speech. (Apx.8a-9a, 12a, 17a). The Fourth Circuit did not address the first issue, in the fashion framed by the County.

REASONS FOR DENYING THE WRIT

1. **THE COURT HAS DENIED THIS TERM A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT ON THE SAME ISSUE.**

The Court has already denied the

Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit in No. 95-203 on the issue of:

> Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the Fourth and Sixth Circuits).

See City of Memphis v. East Brooks Books, Inc., 48 F.3d 22, 224-25 (6th Cir. 1995) (a three to five month wait for administrative hearing did not meet this court's mandate for prompt judicial review).

2. **THE FOURTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT.**

The Fourth Circuit, following the principles enunciated in Freedman v.

Maryland, 380 U.S. 51 (1965) and in FW/PBS, Inc., TBA Paris Adult Book Store II v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), concluded the petitioner did not provide for prompt judicial review that is necessary to guard against the abridgement of protected speech. See also Kingsley Books, Inc. v. Brown, 357 U.S. 436 (1957)(by contrast to the Maryland Procedure in Freedman that failed to pass constitutional mustard, a New York statute intended to prevent the sale of obscene books in requiring a trial one day after joinder of the issues and resolution within two days after the trial, was constitutional); United States v. Thirty-Seven Photos, 402 U.S. 363, 374 (1971) (reasonableness of the time period during which a restraint on speech may operate

prior to judicial review "may vary in different contexts"; a Federal statute imposing a prior restraint to require that judicial review be sought within 14 days and concluding that delays between 40 days and 6 months could not be sanctioned).

The judgment of the Fourth Circuit was consistent with Freedman, 380 U.S., at 55, 59-60 (four months initial judicial review followed by six months on appeal, not prompt judicial review); Southeastern Promotions Limited v. Conrad, 420 U.S. 456, 560-61 (1975)(judicial review 5 months later); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968)(holding prompt judicial review was assured by provisions requiring a judicial determination within 9 days of the decision of the administrative body); Bantam Books, Inc. v. Sullivan, 372 U.S.

58, 70 (1963)(noting that prior restraint on speech "tolerated...only where it...assured an almost immediate judicial determination of the validity of the restraint").

The Fourth Circuit's decision is clearly consistent with this Court's prior restraint analysis. The Court in FW/PBS addressed the two constitutional evils associated with prior restraints:

> While "[p]rior restraints are not unconstitutional per se... [a]ny system of prior restraint ...comes to this Court bearing a heavy presumption against its constitutional validity." Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. 'It is settled by a long line of recent decisions of this Court that an ordinance which. . . makes the peaceful enjoyment of freedoms which the Constitution

> guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'"
>
> Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. . . . Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. . . . [T]his Court [has] held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." Id., 493 U.S., at 225-226. (Citations omitted, emphasis added).

The Court then went on to conclude that the Dallas ordinance provided "no means by which an applicant may ensure that the

business is inspected within the 30-day time period within which the license is purportedly to be issued if approved" or obtain prompt judicial review. Id., 493 U.S., at 227.

3. THERE IS NO IMPORTANT QUESTION RAISED REQUIRING REVIEW OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS.

Like the regulatory scheme in FW/PBS, the administrative process allows indefinite postponement of the issuance of a license and is invalid without further analysis under the holding in FW/PBS. Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994), cert. denied, 115 S.Ct. 1697 (1995)(an adult bookstore ordinance was inadequate under any interpretation of prompt judicial review, because it created a risk that expressive activity could be suppressed indefinitely in the administrative phase prior to a judicial

review of a decision to deny a license). Given this record, there is no reason to revisit FW/PBS after such a relatively short period of time; and, none has been offered.

4. THE OPINION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS.

The County relies upon TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994), as an opinion of another circuit with which the Opinion in this case conflicts. There, the Fifth Circuit found that the County regulation failed to assure maintenance of the status quo while processing an application for a license by a business existing when the County adopted its regulation. The licensing scheme in question required the County to issue or deny an application within 60 days, and the Court held that the 60 days

for acting on a license application imposed no undue burden on the adult bookstore applicant. To the bookstore's objection that the order did not provide prompt judicial review or an automatic stay of an order denying a license, the Court noted that the filing of a notice of appeal to the state court stayed any administrative decision revoking or suspending a license. Id., at 709.

Petitioner points to Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993), which construed an ordinance governing the right to obtain a license to build a structure and operate a newsstand on public property. The main opinion of the five judges only noted that it was an open question whether the procedural protection of Freedman was necessary in an ordinance that regulates the building of newsstands

on public property and seven of the judges who wrote to concur or dissent all indicated their disagreement with the mere availability of prompt judicial review to satisfy this court's requirement of prompt judicial review. Id., at 1330-1336, see also Graff v. City of Chicago, 9 F.3d 1309, 1330-1336 (7th Cir. 1993)(In Banc)(Flaum & Cudahy, J.J., concurring) (Ripple, Cudahy & Rovner, J.J., separately concurring)(Cummings, Bauer & Fairchild, dissenting).

Likewise, Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) was not an adult bookstore case in that it involved assessment of Transit Authority regulations, not a licensing scheme. The persons contacted the authority by telephone and requested and received

permission to engage in non-commercial expressive activity on a first-come-first-served basis; and, if persons were denied authorization in one location, they were permitted to seek to use a different location or to reserve a different time. The court did not hold that access to a court meant proper judicial review. The court found that the authorization requirement was not open to the kind of arbitrary application that this court has determined as inherently inconsistent with a valid time, place and amount of regulation. It held that analysis under Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1991) was the appropriate standard.

5. THE COUNTY MISINTERPRETS THE OPINION OF THE COURT OF APPEALS IN THIS CASE.

In 11126 Baltimore Boulevard v.

Prince George's County, 684 F.Supp. 884 (D.Md. 1988),[2] rev'd 886 F.2d 1415 (4th Cir. 1989), vacated and remanded, 496 U.S. 901, 110 S.Ct. 2580 (1990), appeal dismissed as moot, 924 F.2d 557 (1991), cert. denied, 502 U.S. 819 (1991), this Court ordered that the judgment of the Court of Appeals be vacated and remanded for further consideration in light of FW/PBS, Inc. The County, however, states that the decision of the Court of Appeals in the instant case is in conflict with the Fourth Circuit's decision in 11126 Baltimore Blvd. v. Prince George's County, Md., ("Warwick I") 886 F.2d, at 1428n.8. This argument, however, is made without reference to this Court's order that vacated the judgment of the Court of

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[2] The designation APX refers to the pages of the Appendix.

Appeals and directed it to reassess its judgment in light of FW/PBS. 11126 Baltimore Boulevard v. Prince George's County, 496 U.S. 901. It overlooks that Warwick I has no precedential value and is null and void on the point in issue in this case. See Black's Law Dictionary (6th ed. 1990), at 1548 ("vacate" defined).

CONCLUSION

The Petition for Certiorari should be denied.

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